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Plaintiff NATERA, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA,  
SAN FRANCISCO DIVISION

GUARDANT HEALTH, INC.  
  
Plaintiff and  
Counterclaim-Defendant,

vs.

NATERA, INC.

Defendant and  
Counterclaim-Plaintiff.

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CASE NO. 3:21-CV-04062-EMC

**NATERA, INC.'S MOTION TO  
EXCLUDE THE UNRELIABLE  
ANDERSEN HEARING TRANSCRIPTS**

Hearing: November 4, 2024  
Time: 8:30 a.m.  
Place: Zoom  
Judge: Hon. Edward M. Chen

1 Natera Inc. objects to Guardant Health, Inc.’s use of “deposition designations” from  
 2 unofficial, unsworn, and demonstrably inaccurate transcripts of the Danish hearing of the  
 3 questioning of Dr. Claus Andersen (“Andersen Hearing”) generated by Guardant’s private court  
 4 reporter when there exists an official record prepared by the Danish court.<sup>1</sup> These unreliable  
 5 transcripts are inadmissible pursuant to Rules 403, 604 and 901 of the Federal Rules of Evidence.  
 6 Natera is not objecting to the use of evidence from the Andersen Hearing wholesale—only to the  
 7 unreliable and misleading form that Guardant insists upon.<sup>2</sup> Instead, because the Andersen Hearing  
 8 proceeded pursuant to a request to a foreign authority for evidence, to the extent Guardant intends  
 9 to rely on the proceedings, pursuant to Rule 28 of the Federal Rules of Civil Procedure, it should  
 10 use a certified translation of the official court record generated by the Danish authorities themselves  
 11 regarding evidence from Dr. Andersen. The official Danish record is the relevant “evidence” under  
 12 Rule 28 that may be used as a deposition in the instant case.

### 13 **I. BACKGROUND**

14 On October 23 and 25, 2024, pursuant to a letter of request made pursuant to the Hague  
 15 Convention on Taking Evidence Abroad, Guardant and Natera (“the Parties”) participated in a  
 16 hearing in Viborg, Denmark whereby Danish counsel for both Parties following Danish procedure

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17  
 18 <sup>1</sup> At 11:33 PM on October 31, Guardant served purported designations from its unofficial  
 19 transcript. Ex. C at 3. Natera objected that this was improper and proposed two alternatives: (1)  
 20 designations to a properly certified translation of the Danish record; or (2) a certified translation of  
 21 the Danish video recording of the Andersen Hearing. *Id.* at 2. Guardant rejected both of these  
 without explanation. *Id.* at 1. Subject to the outcome of this motion, Natera reserves its rights to  
 serve objections and counter-designations to Guardant’s designations to the unofficial, unsworn  
 transcripts of the Andersen Hearing.

22 <sup>2</sup> Natera makes this objection separate and apart from any objections Natera may make to any  
 23 particular piece of evidence. While the official Danish record is the appropriate document from  
 24 which to designate, specific designations may be inadmissible for other reasons including the  
 25 Court’s previous rulings on summary judgment and motions *in limine*. For example, the Court has  
 26 indicated that evidence of the Reinert Study can only be used for a very limited purpose: “to shed  
 27 light on the meaning of ‘prospective’ and ‘blinded’ — which are the subject of Natera’s counter-  
 claims against Guardant (asserting the Parikh study is fraudulent because those terms were  
 28 mischaracterized) is properly admitted for purposes of impeaching Natera’s assertions.” Dkt. 509  
 at 15. The Court specifically ordered that “[t]his evidence ***may be admitted for impeachment  
 purposes only*** – demonstrating Natera has taken inconsistent positions relative to its challenge to  
 the Parikh study.” *Id.* Natera objects to Guardant’s attempt to circumvent the Court’s prior order  
 and use this evidence in any way other than for impeachment.

1 questioned Dr. Andersen in Danish before a Danish judge, Honorable Stine Kvesel Mortensen. As  
 2 is customary in Danish proceedings, in addition to Danish counsel for the parties, Judge Mortensen  
 3 also asked questions of Dr. Andersen to confirm her understanding of his answers. Brinck-Jensen  
 4 Decl.<sup>3</sup> ¶ 4. Per the Danish court’s order, the Andersen Hearing was videotaped. Guardant also made  
 5 available an interpreter, Susanne Frank, who conducted a simultaneous translation of the proceeding  
 6 from Danish to English. Ms. Frank, the sole interpreter, was responsible for translating for Dr.  
 7 Andersen, the Parties’ Danish counsel, and Judge Mortensen. A court reporter engaged by  
 8 Guardant, Sherry Yan, was also present to transcribe Ms. Frank’s simultaneous translation. Neither  
 9 the Danish judge, nor the court reporter, administered an oath to the interpreter, Ms. Frank. The  
 10 court reporter, Ms. Yan, prepared unofficial transcripts of Ms. Frank’s simultaneous translation of  
 11 the Andersen Hearing (“Yan Transcripts”) that Guardant has designated for use in the forthcoming  
 12 trial. *See*. Ex. A (Yan Tr. Vol. I); Ex. B (Yan Tr. Vol. II). Those transcripts, however, have not  
 13 been reviewed or certified by the translator.

14 Consistent with Danish procedure, Judge Mortensen prepared a summary of the Andersen  
 15 Hearing as part of the official court record in the Danish proceeding. Brinck-Jensen Decl. ¶ 4. Even  
 16 in Guardant’s own unofficial and uncertified transcript, the record reflects that the presiding Danish  
 17 judge said “I need to make court records of today’s meetings. There are lots of people making notes  
 18 as well, but it is the court record from my side that is what I presume will be used as evidence in an  
 19 American trial”—thus indicating from the Danish perspective that the Danish court’s record was  
 20 the official document to be used in the United States proceeding. Ex. A (Yan Tr. Vol. I) at 6:17-22.  
 21 At the beginning of the October 25 hearing, Judge Mortensen spent hours with Dr. Andersen  
 22 reviewing her summary of the October 23 hearing to confirm with Dr. Andersen that the record was  
 23 an accurate reflection of his answers. Brinck-Jensen Decl. ¶ 5. Subsequently, during a Zoom  
 24 hearing on October 28, Honorable Mortensen again spent multiple hours with Dr. Andersen  
 25 confirming her summary of Dr. Andersen’s October 25 answers was accurate. *Id.* Judge  
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27 <sup>3</sup> “Brinck-Jensen Decl.” refers to the accompanying declaration of Danish attorney Jeppe Brink-  
 28 Jensen.

1 Mortensen’s summaries of the proceedings became available on October 27 and 28, and represent  
 2 the official record in the Danish proceeding. *Id.* ¶¶ 4-5.

## 3 **II. ARGUMENT**

4 This Court previously indicated that the Parties may use the deposition testimony of Dr.  
 5 Andersen at trial, but only “if otherwise admissible.” Dkt. 719 at 2. The unofficial, unsworn Yan  
 6 Transcripts that Guardant has designated are not authorized under Rule 28 of the Federal Rules of  
 7 Civil Procedure and are inherently unreliable and, therefore, should not be admitted.<sup>4</sup> Contrary to  
 8 Guardant’s assertions, the Yan Transcripts are not “a verbatim transcript” of Dr. Andersen’s  
 9 statements under oath. ***These transcripts are instead a transcription of Ms. Frank’s simultaneous***  
 10 ***and uncertified translation.*** Given that Ms. Frank was translating for the witness, the questioning  
 11 attorney, and the judge simultaneously, there are serious questions about the accuracy of the record  
 12 that Guardant is attempting to designate. **Table 1** below shows some examples of potential improper  
 13 translations reflected in Guardant’s designated portions of the Yan Transcripts. *See also e.g.*, Ex. A  
 14 (Yan Tr. Vol. 1) at 10:15-16 (wrongly identifying Dr. Andersen, not Guardant’s Danish counsel, as  
 15 introducing the Reinert Study as Trial Exhibit 4). As a result, the Yan Transcripts should be  
 16 excluded pursuant to Rule 403 of the Federal Rules of Evidence as misleading and confusing. Fed.  
 17 R. Evid. 403.

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 19  
 20 <sup>4</sup> Guardant wrongly argues that Natera did not object to the admissibility of the Yan Transcripts  
 21 during the hearing. Guardant made no effort before the hearing to notify Natera that it would be  
 22 seeking to admit transcriptions of real-time translations as the record of the proceeding in lieu of the  
 23 official record of the Danish Court. Natera was justified in believing that the translation and  
 24 transcription were being made for the U.S. counsel to follow along with the Danish proceedings,  
 25 after which, a properly translated record would be offered. Guardant did not announce this position  
 26 until the end of the first day of the proceeding, upon which Natera’s Danish counsel specifically  
 27 stated that Natera did not agree that Guardant’s translation of the transcript would be admissible in  
 28 the U.S. proceeding. But that is immaterial. The objection for failure to swear a witness or  
 interpreter can be raised at any time before the completion of the trial before it is waived. *United*  
*States v. Perez*, 651 F.2d 268, 273 (5th Cir. 1981) (holding that the failure to swear an interpreter is  
 waived if the objection is raised “after verdict or by the mere failure of counsel to notice the omission  
 before completion of the trial” and finding that defendant’s objection that the interpreter was not  
 properly sworn pursuant to Rule 604 was waived). Therefore, even if the Court does not consider  
 Natera’s objection during the Andersen Hearing, this objection is timely.

**Table 1: Potential Discrepancies Between the Unsworn Translation and the Video of the Andersen Hearing**

<b>Yan Transcript</b>	<b>Unsworn Translation from Ms. Frank</b>	<b>Translation from Video</b>
Ex. A (Yan Tr. Vol. 1) at 41:15-20	So talking about Natera and the Reinert Study that was published in the “American Association for Cancer Research Journal,” abbreviated AAC. Is that correct that they were published there?  Yes.	The first time you and Natera mentioned the results from the Reinert study was 14-18 April 2018 at the American Association for Cancer Research conference, AAC for short. Is that correct?  Yes, it is correct.
Ex. A (Yan Tr. Vol. 1) at 60:21-23	But if we look at this patient, it’s called a schema plot?  Yes, it’s a schema plot.	But if we look at this patient, it’s called a swimmer plot?  Yes, it is a swimmer plot.
Ex. A (Yan Tr. Vol. 1) at 61:11-12	... and that test was then positive, based on the 14 markers.	... and that test was positive based on 9 out of 16 markers.
Ex. A (Yan Tr. Vol. 1) at 74:23-25	So Signatera requires further test to work, requires for there to be tumor issue?  Yes.	So the Signatera test requires tumor tissue?  Yes.
Ex. A (Yan Tr. Vol. 1) at 76:16-17	Yes, because Natera shouldn’t have anything to do if there was cancer in the patient’s bloods.	Yes, because pool 2 has nothing to do with whether patients have cancer DNA in their blood because it’s pool 1 we use for that.
Ex. A (Yan Tr. Vol. 1) at 152:15-16	But to observe how patients are doing upon standard treatment, it’s not necessary to do so.	We had decided on an observational design. We follow the patients and observe them receiving standard treatment. We don’t influence the patients and we don’t intervene. So it was a good design for that.
Ex. B (Yan Tr. Vol. II) at 90:15-17	That’s produced – we are not measuring it. That is just sent to US but according to standard operating procedures.	It’s produced at the hospital where it is, and then it’s sent to our biobank. But according to a standard operating procedure.

1			
2	Ex. B (Yan Tr. Vol. II) at 92:2-3	... then the test will become inferior?	... then you get a poorer analysis?
3			

4 Furthermore, these unofficial deposition transcripts should be excluded for failure to comply  
5 with Rule 604 of the Federal Rules of Evidence because the interpreter was not under oath. Fed. R.  
6 Evid. 604 (“An interpreter must be qualified and must give an oath or affirmation to make a true  
7 translation.”). Not only was the interpreter unsworn, but Guardant failed to provide any evidence  
8 (CV or otherwise) that Ms. Frank was a properly qualified interpreter. Moreover, Guardant failed  
9 to provide any certification or other affirmation that the translation was true and correct and,  
10 therefore, should be excluded for failure to authenticate under Rule 901 of the Federal Rules of  
11 Evidence. Fed. R. Evid. 901; *M&Z Trading Corp. v. Hecny Group*, 41 Fed. Appx. 141, 143 (9th  
12 Cir. 2002) (“Without providing any affidavits or testimony regarding the competency of the  
13 translators for the translations it submitted, M&Z failed to satisfy the accuracy and reliability  
14 requirements of Rule 901...the authentication [] failed under Rule 901.”); *Ruiz v. APCO Const.*, No.  
15 10-cv-1312-JAD-GWF, 2014 WL 2741547, at \*3 n.6 (D. Nev. June 17, 2014) (declining to consider  
16 translated affidavits for failure to properly authenticate where the documents “want[ed] for an  
17 affidavit from the translator attesting to a true and correct translation”); *United States v. Real Prop.*  
18 *Located at 475 Martin Lane, Beverly Hills, Cal.*, No. CV04-2788ABCPLAX, 2007 WL 5559351,  
19 at \*5 (C.D. Cal. Mar. 13, 2007) (declining to consider a Korean contract with English translation  
20 because the translation was not certified and, therefore, are “not authenticated”).

21 Guardant was not without recourse despite the failure to use a properly sworn in interpreter.  
22 To the extent Guardant intended to rely on a transcript from the Andersen Hearing at trial—separate  
23 from the official record—there is a proper process for preparing a certified, translated transcript.  
24 That process would require transcribing the proceeding in Danish and then preparing a certified  
25 translation of that Danish transcription. Guardant has access to the videos from the Danish court of  
26 the proceeding conducted in Danish and has the ability to prepare a properly certified, translated  
27 transcript, but it chose not to.

28 To be clear, Natera is not seeking to exclude all evidence from the Andersen Hearing. The

1 evidence under Danish procedures that reflects the testimony is the official Danish record prepared  
2 by the Danish judge. The Danish record was prepared according to the procedures of the Danish  
3 court, which included the Danish judge spending multiple hours over the course of two hearings to  
4 confirm paragraph-by-paragraph with Dr. Andersen that the record was an accurate reflection of his  
5 testimony. Brinck-Jensen Decl. ¶¶ 4-5. To the extent Guardant intends to introduce evidence from  
6 the Andersen Hearing, Natera contends that a certified translation of the official Danish record is  
7 what should be submitted to the Court.

### 8 **III. CONCLUSION**

9 Based on the foregoing, Natera requests that the Court preclude Guardant from relying on  
10 or using portions of the unofficial transcript of the Danish hearing of the questioning of Dr. Claus  
11 Andersen (i.e., the Yan Transcripts) as deposition designations in this case.

12  
13 DATED: November 4, 2024

QUINN EMANUEL URQUHART &  
SULLIVAN, LLP

14  
15  
16 By /s/ Victoria F. Maroulis

17 Victoria F. Maroulis  
18 Attorneys for NATERA, INC., a Delaware  
19 corporation, Defendant and Counterclaim Plaintiff  
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**ATTESTATION**

I, Andrew J. Bramhall, am the ECF user whose ID and password are being used to file the above document. In compliance with Local Rule 5-1(i)(3), I hereby attest that Victoria F. Maroulis has concurred in the filing of the above document.

By /s/ Andrew J. Bramhall

Andrew J. Bramhall